IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

WEDNESDAY, THE 7TH MARCH 2007 / 16TH PHALGUNA 1928

MACA.No. 429 OF 2006()

OPMV.271/2002 OF MOTOR ACCIDENT CLAIMS TRIBUNAL, KOTTAYAM

APPELLANTS/PETITIONERS:

P.G. JAYALEKSHMI AMMAL,
D/O. LATE GOVINDA PILLAI, PANACHKAL HOUSE,
PANTHATHALA BHAGOM, MUTHOLY P.O., PULIYANNOOR,
PALA, KOTTAYAM DISTRICT.

BY ADV. SRI.P.C.HARIDAS

RESPONDENTS: RESPONDENTS:
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1. RAJESH K.VARGHESE,
KARUKACHERIL HOUSE, MANGANAM P.O., KOTTAYAM.

2. THE ORIENTAL INSURANCE CO.LTD.,
KOTTAYAM.

R2 BY ADV. SRI. MATHEWS JACOB

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 07/03/2007, ALONG WITH MACA NO. 193 OF 2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R. RAMAN & SIRI JAGAN, JJ.

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M.A.C.A. NOS. 429 & 193 OF 2006

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DATED THIS, THE 7TH DAY OF MARCH, 2007

J U D G M E N T

Raman, J.

Appellant in M.A.C.A. No. 429/2006 is the petitioner in O.P. (MV) No. 271/2002 on the files of the Motor Accidents Claims Tribunal, Kottayam. M.A.C.A. No. 193/2006 is filed by the Oriental Insurance Company Limited, who was the third respondent in the said original petition.

2. The claim petition was filed under Section 166 of the Motor Vehicles Act seeking compensation for the injuries sustained to the appellant in a road accident. The appellant was a Post Mistress. According to her, on 3.2.2002, while she, along with others, was travelling in a jeep bearing Reg. No. KL5A/2259 from Vallikkavu to Mutholy, the jeep met with an accident at Neelimangalam when a Maruthi van bearing Reg. No. KL-5 L 853, driven by the first respondent came from the opposite direction and hit against the jeep. It was contended that the Maruti van

was driven by the first respondent in a most rash and negligent manner and at a high speed. The appellant sustained (i) amputation of right leg at femur, (ii) comminuted compound fracture at lower femur, (iii) comminuted compound fracture at upper end of tibia, (iv) comminuted compound fracture at upper end of fibula, (v) grievous crush injuries at right leg, (vi) loss of vascularity and (vii) injury at right hand. The appellant was taken to the Medical College Hospital, Kottayam, where she was given first aid and X-rays were taken. She was discharged from there and as amputation of the right leg at femur was required to be performed, she was taken to Matha Hospital, Kottayam, where she was treated as an inpatient from 3.2.2002 to 13.2.2002 and her right leg was amputated at femur. Again she was admitted in the hospital as infection developed. As a result of the accident, she suffered disablement and she cannot do the work which she was doing prior to the accident because of restriction of movements on account of the disability. She is an unmarried lady requiring assistance of a bye-stander for her daily routine in future, due to the accident.

3. The first respondent, in his written statement contended that the petition is not maintainable and is bad for non-joinder of parties. It is alleged that negligence is on the part of the driver of the jeep in which the appellant was travelling. The injuries sustained were also disputed. The

second respondent is the Oriental Insurance Company Limited, who is the insurer of the vehicle. They filed a written statement contending that the petition is not maintainable and disputed the allegation of negligence on the part of the first respondent and also the nature of the injuries sustained. The insurance of the maruti van with the second respondent was, however, admitted. Exts A1 to A20 were marked on the side of the claimant. The Tribunal, by the award impugned in this appeal, found that the accident occurred due to the rash and negligent driving of the maruti van by the first respondent. Thereafter, it proceeded to quantify the amount awardable by way of compensation. Based on Ext.A14 certificate issued by the Post Master, the monthly salary of the petitioner was fixed as Rs. 3,803/-. It was found that the age of the petitioner at the time of the accident was 52 years. The medical records proved that the appellant sustained injuries as stated above. It was also found that the appellant's leg was amputated due to the injury sustained on her leg. After considering the entire materials on record, the tribunal found that an amount of Rs.40,000/- is payable as compensation for pain and suffering, that the appellant is entitled for an amount of Rs. 26,367/- as loss of earnings as she was on leave without allowance from 4.2.2002 to 31.8.2002 as evidenced by Ext.A15. An amount of Rs. 5,000/- was also awarded towards transportation expenses and Rs. 300/- towards compensation for damage to clothings. The medical

bills Exts.A16 series and A 17 were relied on and an amount of Rs. 34,950/- was awarded towards compensation for medical expenses. Rs.7,000/- was awarded towards bye-stander expenses as against the claim of Rs.9,500/-. In this regard, Exts.A19 series bills issued by the Aiswaria Home Nursing Services for Rs. 9,500/- was found to have been not proved and that is the only reason for reducing the amount to Rs. 7,000/-. An amount of Rs. 95,620/- was awarded towards the cost of artificial limb as proved by Ext.A18 series of bills. Ext.A20 is the disability certificate issued by Dr. Jayachandran, Consultant, Plastic, hand and Microsurgeon who certified that petitioner has got a permanent disability of 55% . But Ext.A20 was not proved as required by law. The appellant contended that Ext.A20 is not correct and the disability would be 80% as per Schedule -I of the Workmen's Compensation Act and Ext.A20, even according to the appellant, is liable to be discarded. The court below got measured the disability of the petitioner through a lady Advocate and satisfied that she has sustained a disability of 80%. Since the petitioner was working as Postmistress even then, it was found that the disability will not affect her earning capacity till her retirement and accordingly, the court below accepted 8 as the multiplier for fixing compensation, taking her monthly income after retirement at Rs.2000/-. Thus, an amount of Rs. 1,53,600/- was allowed for loss of earning power, besides an amount of Rs. 50,000/-

for loss of amenities and Rs. 20,000/- as compensation for future assistance. A further amount of rs. 25,000/- was awarded on account of disfigurement and the rest of the claims were disallowed. Thus, a total compensation of Rs. 4,59,037/- was awarded with interest at 6% from the date of petition till realization. An amount of Rs. 1,50,000/- was permitted to be withdrawn and the balance was directed to be deposited in Bank for three years.Rs.5,000 was awarded towards cost also. The appellant challenges the award seeking further enhancement of compensation.

4. MACA 193/2006 is filed by the Insurance Company impugning the award. The Insurance Company has raised a contention that the tribunal has arbitrarily fixed 80% permanent disability when as per Ext.A2 certificate issued by the competent doctor, the disability is assessed only at 55%. It was also contended that Schedule I of Workmen's Compensation Act cannot be considered in this case as the claimant is not suffering any loss of earning capacity at least till the age of 58. The adoption of 8 as the multiplier is also contended to be wrong. The loss of earning power after retirement is contended to be not sustainable.

5. We have heard the arguments on either side. We shall first consider the contention regarding the assessment of disability at 55% as certified in Ext.A20 by a competent doctor. It is a fact that Ext.A20 was not proved by examining the doctor. According to the claimant, Ext.A20

is liable to be discarded and her disability is to be assessed as 80% as per Schedule I of Workmen's Compensation Act. The only evidence which the tribunal had relied on for fixing 80% disability is based on the opinion given by a lady Advocate who examined the appellant and stated that the amputation is below the hip with stump not exceeding 5 inches in length measured from the tip of trochanter. For a disability of this nature, since the claim is under section 166 of the Motor Vehicles Act, the tribunal could assess the disability only based on the materials produced in the case. If Ext.A20 medical certificate produced in the case is not acceptable for any valid reason, the tribunal could have only directed the appellant to be examined by a medical board and to get the opinion of that board for the purpose of fixing the percentage of disability. No such attempt was made. When Ext.A20 medical certificate was issued by the Doctor who treated the claimant, either the same could have been accepted by the tribunal or in the alternative as suggested above could have referred the matter to the medical board for a fresh assessment. In such circumstances, the tribunal could not have fixed the disability at 80% merely relying on the opinion of a lady Advocate who has no expertize in the matter of assessing the percentage of disability. Even though it is contended by the appellant/claimant that considering the extent of the amputation made and as per Schedule I of the Workmen's Compensation Act, 80% disability should be assessed, we are

not persuaded to accept this contention. Section 163 A of the Motor Vehicles Act provides for a structured formula in the matter of assessment of compensation in which case the percentage of disability fixed by the Workmen's Compensation Act would have been relevant. But in this case, the appellant has not opted to have the claim adjudicated under Section 163A, rather she filed the application under Section 166 of the said Act. Therefore, the structured formula as is applicable for assessment of compensation under Section 163A is not applicable. It is contended by the appellant, placing reliance on the decision of a Division Bench of this Court in **National Insurance Co. Ltd. v. Muneer (2003 (1) KLT 137),** that even by making the assessment in a claim made under Sections 166 and 168 normally, the quantum of compensation should not be lesser than the amount payable under structured formula under Section 163A. The appellant/claimant has no case that the total compensation awarded as per the impugned award will be less than the total amount awardable under Section 163A. In the very same decision, it has been held that the claim under Section 168 of the Motor Vehicles Act and 163A of the Motor Vehicles Act are alternative and claimant cannot claim under both with a prayer to adjust the amount paid under Section 163A to his claim under Section 166/168. There is nothing in the said decision to suggest that for the purpose of calculating the minimum compensation payable the amount

awardable under each head should be separately taken into account. This will virtually be an exercise of assessment of compensation simultaneously under both these provisions which cannot be permitted. When there is an option available to the claimant either to seek recourse to the claim being assessed under Section 163A or under Section 116 or 168 as the case may be and the appellant having chosen to have the assessment under Section 166 of the act, unless it is further established that the total compensation awarded under Section 166 is less than the compensation awardable under Section 163A, the appellant's contention cannot be supported and there is nothing in the said decision advancing her contention as such.

6. In this case, admittedly, compensation has been awarded under various heads separately and it is only in respect of the compensation awardable for the disability that the tribunal has chosen to award compensation fixing the disability at 80% over 55%, ignoring Ext.A20 certificate. If there is any independent evidence to fix the disability at 80%, that is a different matter. But we only state that assessment of the compensation under Section 166 of the Act under any particular head cannot be quantified following the structural formula under Section 163A as claims under both these provisions are alternative. In this case, as we have already discussed above, 80% disability was fixed by the court below without aided by any expert evidence in that aspect. On the other hand, the

medical certificate produced by the appellant, Ext.A20, shows that the disability is only 55%. If, for any reason, the certificate could not be accepted and further assessment is required to meet the ends of justice, as we have already observed, the tribunal ought to have got the appellant examined by a medical board so as to assess her percentage of disability and thereafter proceeded to assess the compensation payable under this head based on consideration of the entire evidence with regard to the same. In so far as the Tribunal has assessed the compensation under this head at 80% without any materials in support, the same is liable to be set aside and we do so.

7. In the appeal filed by the claimant, though she has claimed enhancement, the only head under which she is entitled for enhancement is towards bye-stander expenses. Ext.A19 series bills produced by the appellant shows that an amount of Rs. 9,500/- was incurred towards bye-stander expenses. In the absence of any contra evidence, this should have been accepted . But the tribunal has only awarded Rs. 7,000/- under this head. In the circumstances, we find that the claimant is entitled to an amount of Rs. 2,500/- more towards bye-stander expenses.

8. Even though the appellant insurance company would contend that the compensation awarded towards pain and suffering, transportation etc. are excessive and the claimant seeks enhancement of the claim under

various heads, we have meticulously gone through the award and are satisfied that the compensation awarded under various heads are only just and reasonable and it does not call for any interference.

9. In the result, both the appeals are partly allowed as detailed above. The matter is remanded to the court below so as to reconsider the matter to the limited extent of determining the compensation for disability in accordance with law, subject to what has been stated above.

The parties shall appear before the court below on 9.4.2007.

P.R. RAMAN,
(JUDGE)

S.SIRI JAGAN,
(JUDGE)

knc/-